

Cross-Border Practice in the Legal Profession: Precautions for a Transnational Lawyer

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I. INTRODUCTION

National boundaries have disappeared and legal practice units have abandoned structures limited by territorial jurisdiction.¹ Globalization insinuates “the end not of history, but of geography, in the sense of the importance of geophysical boundaries.”² The perception of territory is blurring swiftly because the traditional notions for the need for “boundaries” are more for geographical implementations than anything else. In fact, globalization has developed from a borderless market for commodities to more sophisticated forms of transactions. Unlike the bulk of services that were popularly outsourced from one country to the next, the so-called

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1. H. Patrick Glenn, *Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977, 977 (2001).
2. *Id.* at 977 (citing ZYGMUNT BAUMAN, *GLOBALIZATION: THE HUMAN CONSEQUENCES* 12 (1998)).

“second wave of globalization” has become a spin from a developing tradition.³ These “traditional” services involved labor that was repetitive, procedural, and relatively uncomplicated. Examples include “back office data entry and data processing, back office administration, human resource administration, bookkeeping, facility management, publication layout, and customer call centres.”⁴ These days, however, “off-shoring” has stretched into more specialized assignments that call for expert advice and require greater participation with an organization’s value.⁵ Among these more specialized tasks are the legal firms that are off-shoring litigation and patent research.⁶

Buzz-phrases such as the “Transnational Legal Field” and “Contemporary Legal Practice” have gained more sizzle during the past years. The Transnational Legal Field has an even wider scope than before; designated as the “ensemble of actors, practices[,] and institutional processes that are involved in the creation, maintenance[,] and change of the ‘law which regulates actions or events that transcend national frontiers.’”⁷ On the one hand, by removing borders, the result is a divergent and diminished role of state law and an enhanced role of comparative law or transnational law because of the extension towards the globalized world of legal practice.⁸ On the other hand, Comparative Legal Practice “implies an understanding of the circumstances of contemporary legal practice as well as its impact in the resolution of legal problems, both within states and between states.”⁹

II. METHODS OF CROSS-BORDER PRACTICE

A lawyer who seeks to practice in a foreign jurisdiction is allowed a license through one of four methods: (1) by registering as a foreign legal consultant; (2) by registering as a foreign consultant in a “Fly In-Fly Out” basis; (3) by administering legal advice without coursing through the regulatory measures established by the State; or (4) by meeting the State’s educational and

3. Oshani Perera, et. al., *Towards Sustainable Outsourcing: A Responsible Competitiveness Agenda for IT-Enabled Services* (A Project of the International Institute for Sustainable Development) 23, available at http://www.iisd.org/pdf/2009/towards_sustainable_outsourcing.pdf (last accessed Nov. 15, 2011).

4. International Institute for Sustainable Development, *Globalization of Services*, available at <http://www.iisd.org/markets/globalization/> (last accessed Nov. 15, 2011).

5. *Id.*

6. *Id.*

7. Sigrid Quack, *Legal Professionals and Transnational Law-Making: A Case of Distributed Agency*, 14 *ORG.* 643, 645 (2007).

8. Glenn, *supra* note 1, at 980.

9. *Id.*

character requirements through the bar examinations.¹⁰ The first three methods shall be discussed below.¹¹

A. Foreign Legal Consultant Status

Foreign legal professionals may be allowed, under certain conditions, to practice the domestic law of another state. Aside from the law of the host state, the practice of international law, the law of his home country, or that of a third country, may be implemented by the Foreign Legal Consultant (FLC).¹² In these circumstances, a state may permit either advisory services only or it may, subject to approval, deputize an FLC in representation services.¹³ This means that the FLC may represent his client before the domestic courts or in an arbitration tribunal in the host country. In sum, “professionals practi[c]ing international, home[,] and third country law” are called FLCs.¹⁴

In the United States (U.S.), 21 jurisdictions have adopted FLCs as of 1997.¹⁵ In 2007, five more states were added to the list.¹⁶ This movement towards recognizing FLCs has, however, shown less favorable reception in the late 21st century.¹⁷ The ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants (ABA Model Rule)¹⁸ has pressured jurisdictions

10. Carol A. Needham, *Practicing Non-U.S. Law in the United States: Multijurisdictional Practice, Foreign Legal Consultants and Other Aspects of Cross-Border Legal Practice*, 15 MICH. ST. J. INT'L L. 605, 612 (2007) [hereinafter *Practicing Non-U.S. Law in the United States*].

11. *Id.*

12. Council for Trade in Services (CTS) Secretariat, *Legal Services*, ¶ 67, S/C/W/43 (July 6, 1998).

13. *Id.*

14. *Id.* ¶ 18.

15. Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 FORDHAM INT'L. L.J. 1126, 1126 (1997). These jurisdictions are: Alaska, Arizona, California, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Texas, and Washington. *Id.*

16. *Practicing Non-U.S. Law in the United States*, *supra* note 10, at 613.

17. *Id.* at 612. The States that were added to the list of those that adopted FLCs are: Idaho, Louisiana, Michigan, North Carolina, and Pennsylvania. *Id.*

18. American Bar Association, ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants, *available at* <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/FLC.authcheckdam.pdf> (last accessed Nov. 15, 2011) [hereinafter ABA Model Rule]. A brief history of the ABA Model Rules is summarized, thus:

in the U.S. to comply with their regulations. Section 1 of the ABA Model Rule provides that:

In its discretion, the [name of court] may license to practice in this U.S. jurisdiction as a foreign legal consultant, without examination, an applicant who:

(a) is, and for at least five years has been, a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

(b) for at least five years preceding his or her application has been a member in good standing of such legal profession and has been lawfully engaged in the practice of law in the foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the foreign country;

(c) possesses the good moral character and general fitness requisite for a member of the bar of this jurisdiction; and

(d) intends to practice as a foreign legal consultant in this jurisdiction and to maintain an office in this jurisdiction for that purpose.¹⁹

As can be gleaned from above, any lawyer who has practiced for at least five years in his host country, is a member of good standing, and can maintain an office in said jurisdiction, is allowed to practice law. These are the minimum requirements envisioned by the ABA Model Rule. However, states are not precluded from imposing additional requirements.²⁰ As an example, a state may impose a residency requirement, which will necessarily hamper the FLC's ability to conduct law practice in states outside of his residence (unless such other state does not require any residency to practice

In August 1993, the ABA House of Delegates approved the ABA Model Rule for the Licensing of Legal Consultants. The language of that model rule was reaffirmed by the House of Delegates in August 2002 in Recommendation 201H, which was included in the Report to the House of Delegates by the ABA Commission on Multijurisdictional Practice. The ABA House of Delegates voted in August 2006 to amend and retitle the model rule, which is now referred to as the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants.

Practicing Non-U.S. Law in the United States, *supra* note 10, at 613 (citing ABA Comm. On Multijurisdictional Practice, Rep. 201B (2002)), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201b.authcheckdam.pdf> (last accessed Nov. 15, 2011).

19. ABA Model Rule, *supra* note 18, §§ 1 (a)-(d).

20. *Practicing Non-U.S. Law in the United States*, *supra* note 10, at 613.

law).²¹ The regulations regarding FLCs differ with some states being more strict than others. For instance, the phrase “lawfully engaged in the practice of law in the foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the foreign country” is flexible in some states which refer to practice in the said foreign state, whereas other jurisdictions require practice anywhere.²² In one state, requirements as to the need for years of practice are completely silent.²³

While eligibility seems rather trouble-free, the application process counters the facility of entrance by requiring the foreign lawyer to submit numerous documents that show his admission to practice in the country where he is licensed and to also show documents that will prove his good standing, among others.²⁴ The process seems discouraging considering that many of those who do not have a license in such state have no intention to establish a practice and only anticipate temporary relations in that jurisdiction.²⁵

The Asia-Pacific Economic Cooperation (APEC) recognizes that in the Philippines, “[a] foreign lawyer cannot obtain a limited licen[s]e entitling them to offer advisory services in foreign and international law (i.e.,] become a foreign legal consultant).”²⁶

21. *Id.*

22. *Id.*

23. *Id.* at 615.

24. *Id.* at 620. An applicant is generally required to provide numerous documents including:

- (1) a certificate demonstrating the date of his admission to practice in the country where he is licensed;
- (2) evidence from the disciplinary authority in his home country that he is an attorney in good standing;
- (3) letters of recommendation, often including at least one letter from a judge who is a member of the highest court in the country or from a member of the executive body of the legal profession in that country; and
- (4) affidavits from two attorneys in the applicant’s home country stating the nature and extent of their acquaintance with the applicant and their personal knowledge of the character and extent of the applicant’s practice of law.

Id.

25. *Practicing Non-U.S. Law in the United States*, *supra* note 10, at 619.

26. Asia Pacific Economic Cooperation, Legal Services Initiative, *available at* <http://www.legalservices.apec.org/inventory/philippines.html> (last accessed Nov. 15, 2011) [hereinafter APEC Legal Services Initiative].

B. Temporary Practice

Instead of the FLC, clients may opt to consult lawyers with an expertise in a limited project or matter. As an alternative to retaining one lawyer as a permanent counsel, the patron may choose to bring in external advice on an as-needed basis.²⁷ The term “Fly In-Fly Out” lawyer was coined to “allow clients to obtain legal advice from a larger group of lawyers licensed outside the [U.S.] and to give permission [to the foreign lawyer] to give legal advice while in the host state on a temporary basis.”²⁸ This set-up allows interim practice for lawyers who are wanted for their expertise on a particular subject, without going through the rigorous ordeal of complying with the requirements of the FLC.²⁹

The ABA Model Rule for Licensing of Legal Consultants takes, for instance, the following circumstances as basis for the need for lawyers who are considered as “practicing law on a temporary basis;”

For example, a foreign lawyer who is negotiating a transaction on behalf of a client in the lawyer’s own country may come to the [U.S.] briefly to meet other parties to the transaction and their lawyers or to review documents. Or a foreign lawyer conducting litigation in the lawyer’s home country may come to the [U.S.] to meet witnesses. While it is not feasible for foreign lawyers in such circumstances to seek admission as foreign legal consultants, it should nevertheless be permissible for them to provide these temporary and limited services in the [U.S.].³⁰

The Model Rule for Temporary Practice by Foreign Lawyers identifies five situations in which a foreign lawyer may provide temporary legal services in the U.S.:

- (1) if they do so in association with a lawyer who actively participates in the matter;³¹
- (2) if the work is reasonably related to a pending or potential proceeding before a court outside of the U.S., just as long as the lawyer is allowed to appear in such court;³²

27. *Practicing Non-U.S. Law in the United States*, *supra* note 10, at 621.

28. *Id.*

29. *Id.*

30. American Bar Association Center for Professional Responsibility, Client Representation in the 21st Century (A Report of the Commission on Multijurisdictional Practice) 59-60, available at http://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_121702_2.authcheckdam.pdf (last accessed Nov. 15, 2011) [hereinafter Report on Multijurisdictional Practice].

31. AMERICAN BAR ASSOCIATION (ABA) MODEL RULES FOR PROFESSIONAL CONDUCT, rule 5.5 (c) (1); Report on Multijurisdictional Practice, *supra* note 30, at 60.

- (3) if the services are reasonably related to an alternative dispute resolution proceeding such as arbitration and mediation;³³
- (4) if the services are for a client who resides or maintains an office in a jurisdiction that admits the lawyer for practice or if the services are reasonably related to matters connected to the jurisdiction in which the lawyer is authorized to practice;³⁴
- (5) if the services are governed primarily by international law.³⁵

In the Philippines, there is no express ruling that allows temporary practice for foreign lawyers.³⁶ While the general rule is that the practice of law is limited to citizens of the Philippines, the “Fly In-Fly Out” lawyer hovers over a gray area in terms of validity vis-à-vis municipal law.

C. Under the Radar Practice

Lawyers may be indirectly invested in practice by associating with a lawyer who holds a duly authorized license to practice in the host state.³⁷ The biggest challenge is to maintain interactions between the local lawyer and the client. There exists a chain of communication from the foreign lawyer to the local lawyer, and from the local lawyer to the client. By sustaining this set-up, there is no unauthorized practice of law. The state of affairs may be viewed in a manner where:

the degree of control actually exerted by a locally licensed lawyer is likely to be minimal in many cases, as may be the case when the local counsel is not himself fully able to assess the quality of the non-[U.S.] lawyer’s interpretation of the law of the other country. This is particularly true when a client in the [U.S.] needs advice regarding the intricacies of the law of another country or international law and the lawyer licensed in the host state is not as well versed on those issues as is the foreign legal consultant.³⁸

Under the Radar Practice happens when there is no locally licensed lawyer to course communications between the client and the foreign lawyer.³⁹ In the U.S., there is a range of sanctions when a situation like this

32. ABA MODEL RULES FOR PROFESSIONAL CONDUCT, rule 5.5 (c) (2).

33. *Id.* rule 5.5 (c) (3).

34. Report on Multijurisdiction Practice, *supra* note 30, at 60.

35. *Id.* at 61.

36. APEC Legal Services Initiative, *supra* note 26.

37. *Practicing Non-U.S. Law in the United States*, *supra* note 10, at 629.

38. *Id.* (citing Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995)).

39. *Practicing Non-U.S. Law in the United States*, *supra* note 10, at 629.

takes place.⁴⁰ At the very least, where the legal services exceed the sanctioned association, the litigation opponent may contest the operation of the attorney-client privilege by saying that “the person delivering the legal advice could not be acting as a lawyer.”⁴¹

Practice in the Philippines has been limited by the Constitution in black and white: “[t]he practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law.”⁴² Further, it is doubtful that any type of indirect practice as mentioned earlier should be allowed. Under the Code of Professional Responsibility,⁴³ “a lawyer shall not delegate to any unqualified person the performance of any task which by law may only be performed by a member of the Bar in good standing.”⁴⁴

III. CROSS-BORDER PRACTICE PRINCIPLES

The globalized economy has led many states into opening up their borders not only to goods, but to professionals as well. The growth in calculating market power no longer confines itself to local numbers but bursts overseas. Yet, the international trend on cross-border practice is something that the Philippines has yet to evaluate.

In an Address delivered by Justice Dante O. Tinga,⁴⁵ he points out that “[t]he accession by the Philippines to the General Agreement on Trade in Services (GATS)⁴⁶ as part of the Uruguay Round Agreement might very well be the gateway to the allowance of cross-border practice of law in the Philippines.”⁴⁷ While clear provisions allowing cross-border practice are

40. *Id.*

41. *Id.* at 630.

42. PHIL. CONST. art. XII, § 14, ¶ 2.

43. Integrated Bar of the Philippines Code of Professional Responsibility [CODE OF PROFESSIONAL RESPONSIBILITY].

44. *Id.* canon 9, rule 9.01.

45. Dante O. Tinga, Justice of the Supreme Court, From General Practice to Cross-Border Practice: The Changing Trends and Paradigms, Address at the Commencement Exercises of the Ateneo de Manila School of Law (Apr. 27, 2008) (transcript available at <http://sc.judiciary.gov.ph/publications/benchmark/2008/05/050827.php> (last accessed Nov. 15, 2011)) [hereinafter From General Practice to Cross-Border Practice].

46. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

47. From General Practice to Cross-Border Practice, *supra* note 45.

wanting, Justice Tinga might have argued, as many have,⁴⁸ from the angle in which the term “service” is defined in the General Agreement on Tariffs and Trade (GATT).⁴⁹ In the GATT, “service” is “any service in any sector except services supplied in the exclusive governmental authority.”⁵⁰

The GATS was entered into with this end in mind: the creation of a credible system of international trade rules which promotes trade and development through progressive liberalization.⁵¹ Services, which account for more than 60% of global production and employment, were the central discussion in the GATS, pointing that:

Many services, which have long been considered genuine domestic activities, have increasingly become internationally mobile. This trend is likely to continue, owing to the introduction of new transmission technologies (e.g. electronic banking, tele-health or tele-education services), the opening up in many countries of long-entrenched monopolies (e.g. voice telephony and postal services), and regulatory reforms in hitherto tightly regulated sectors such as transport. Combined with changing consumer preferences, such technical and regulatory innovations have enhanced the ‘tradability’ of services and, thus, created a need for multilateral disciplines.⁵²

The GATS is composed of six parts. Part II covers the General Obligations and Disciplines which in turn contains the Most Favored Nation Clause. Part III of the Agreement includes the specific commitments, which contains the principle of National Treatment. Part IV imposes the duty of nations to progress into a higher level of liberalization by entering into successive rounds of negotiations. These principles will be discussed below.

A. Most Favored Nation Clause

48. See H. Harry L. Roque, Jr., *Globalization of Legal Services: Challenges and Possibilities in the Philippines Setting*, in 8TH ASEAN LAW ASSOCIATION GENERAL ASSEMBLY WORKSHOP PAPERS 57 (2003).

49. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

50. *Id.* art. I (3) (b).

51. The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines, available at http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last accessed Nov. 15, 2011).

52. *Id.*

The Most Favored Nation Clause foists non-discrimination among the nation-states members of the GATT.⁵³ This principle requires that trading partners engage without discrimination between its own products and foreign products, services, or nationals.⁵⁴ Negotiation is encouraged to destroy arbitrary barriers.⁵⁵ In the World Trade Organization (WTO), tariff rates and commitments are generally bound.⁵⁶ Also, practices such as export subsidies and dumping below cost are prohibited.⁵⁷ This set-up thus becomes more beneficial for developing countries due to flexibility and special privileges.⁵⁸

The principle requiring unconditional favor, privilege, or immunity to products originating or destined towards another contracted party is described hereunder:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in [P]aragraphs 2 and 4 of Article III, any advantage, favour, privilege[,] or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.⁵⁹

By applying the Most Favored Nation Clause to professional services, the necessary consequence is that permission for foreign lawyers who are citizens of a contracting party to the GATT to practice in this jurisdiction would amount to a corresponding grant to all lawyers belonging to signatory countries the same access and privileges to their courts.

B. National Treatment Principle

A parallel doctrine maintained by the GATT, the National Treatment Principle, seeks to eliminate covert barriers of trade among members by according imported products treatment which is “no less favourable than that

53. World Trade Organization, Principles of the trading system, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last accessed Nov. 15, 2011).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. GATT 1994, *supra* note 49, art. I (1).

accorded to products of national origin.”⁶⁰ The principle maintains the essential balance of rights and obligations in multilateral trading systems.⁶¹

The National Treatment Principle states that:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution[,] or use. The provisions of this [P]aragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.⁶²

60. Ministry of Economy, Trade and Industry of Japan, National Treatment Principle, *available at* <http://www.meti.go.jp/english/report/downloadfiles/gCT0002e.pdf> (last accessed Nov. 15, 2011).

61. *Id.*

62. GATT 1994, *supra* note 49, art. III (4). The text on the National Treatment Principle regarding internal taxation and regulation is provided below:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in [P]aragraph 1.

3. With respect to any existing internal tax which is inconsistent with the provisions of [P]aragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of [P]aragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

Through this principle, foreign lawyers should be able to enjoy the same rights as lawyers who are allowed to practice in the Philippines. These trade agreements have created parity rights in favor of foreign lawyers.

C. GATS and the Legal Profession

Specific provisions of the GATS are important to the provisions on professional services. These provisions for cross-border services were the basis of service negotiations during the fifth year anniversary of the WTO between two nations proposing negotiations on limited cross-border provisions of legal services.⁶³

Paragraph 6 of Article VI of the GATS provides that “[i]n sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate provisions to verify the competence of professionals of any other member.”⁶⁴ Further, Paragraph 1 of Article VII provides that “[f]or the purposes of the fulfillment ... of its standards or criteria for the authorization, licensing[,] or certification of services suppliers ... a Member may recognize the education or experience obtained ... in a particular country.”⁶⁵

IV. THE PHILIPPINE DILEMMA

Justice Tinga considered the issue of cross-border practice as a “sensitive topic” due to the existing legal barriers built first and foremost by the

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in [P]aragraph 1.

...

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

Id. art. III, ¶¶ (1), (2), (3), (5), & (9).

63. Roque, *supra* note 48, at 58.

64. *Id.* ; GATS, *supra* note 46, art. VI, ¶ 6.

65. Roque, *supra* note 48, at 58 ; GATS *supra* note 46, art. VII, ¶ 1.

Constitution.⁶⁶ This is counter-acted by the Philippine ratification of the GATS in 1994.⁶⁷ However, the Philippines is still yet to make any commitments regarding cross-border legal services.⁶⁸

The practice of law, liberally defined in *Cayetano v. Monsod*,⁶⁹ “is not to be treated as a right, but rather as a privilege conferred by the State to only a select few who possess, and continue to possess, the qualifications required by law for the enjoyment of such privilege.”⁷⁰ *Cayetano* established the working definition for “the practice of law” to be:

any activity, in or out of court, which requires the application of law, legal procedure, knowledge, training and experience. To engage in the practice of law is to perform those acts which are characteristics of the profession. Generally, to practice law is to give notice or render any kind of service, which device or service requires the use in any degree of legal knowledge or skill.⁷¹

The definition provided by the Court in *Cayetano* has broadened the meaning of the term *practice*. Because any activity in and out of court requiring the application of the law constitutes “practice of law,” the exclusivity of legal practice in the Philippines is further highlighted because it restricts all those who are unable to cooperate with the stringent requirements of the Constitution from any Method of Practice in this jurisdiction.⁷² *Cayetano* was a case concerning the eligibility of Christian S. Monsod to his appointment as Chairman of the Commission on Elections, to which the number of years of his “law practice” were the crux of the affairs.⁷³ In clutching onto the spirit of the law, the Court has incidentally brought itself before the discussions on “trade liberalization,” a term which does not remotely appear in the case itself. In his dissent, Justice Isagani A. Cruz, states that —

The *ponencia* quotes an American decision defining the practice of law as the ‘performance of any acts ... in or out of court, commonly understood to be the practice of law,’ which tells us absolutely nothing. The decision goes on to say that ‘because lawyers perform almost every function known

66. From General Practice to Cross-Border Practice, *supra* note 45.

67. See From General Practice to Cross-Border Practice, *supra* note 45.

68. Roque, *supra* note 48, at 60.

69. *Cayetano v. Monsod*, 201 SCRA 210 (1991).

70. Johann Carlos S. Barcena, *Shifting to an Open Legal Market Policy: The Prospect of Multi-Jurisdictional Practice of Law in the Philippines Under the Aegis of the General Agreement on Trade in Services (GATS)*, 84 PHIL. L. J. 654, 655 (2010).

71. *Cayetano*, 201 SCRA at 214 (citing 111 ALR 23).

72. See PHIL. CONST. art. XII, § 14, ¶ 2.

73. See generally *Cayetano*, 201 SCRA 210.

in the commercial and governmental realm, such a definition would obviously be too global to be workable.⁷

The effect of the definition given in the *ponencia* is to consider virtually every lawyer to be engaged in the practice of law even if he does not earn his living, or at least part of it, as a lawyer. It is enough that his activities are incidentally (even if only remotely) connected with some law, ordinance, or regulation. The possible exception is the lawyer whose income is derived from teaching ballroom dancing or escorting wrinkled ladies with pubescent pretensions.⁷⁴

The Supreme Court in *In Re: J.F. Boomer*,⁷⁵ classified the legal profession to be one which required the exercise of a public function. It held that “the Sovereignty of the people stands behind all public functions, and it is a matter of high and wise policy not to entrust that function to foreigners.”⁷⁶ In *UP Board of Regents v. Hon. Ligot-Telan*,⁷⁷ the Court said —

Let it not be forgotten that respondent aspires to join the ranks of the professionals who would uphold truth at all costs so that justice may prevail. The sentinels who stand guard at the portals leading to the hallowed Temples of Justice cannot be overzealous in admitting only those who are intellectually and morally fit. In those who exhibit duplicity in their student days, one spots the shady character who is bound to sow the seeds of chicanery in the practice of his profession.⁷⁸

Notwithstanding the doctrinal precedents of the aforementioned cases, the practice of law has lost its faithfulness in the stringent measures held in the cases of *In Re: J.F. Boomer* and *UP Board of Regents*.

74. *Id.* at 235 (J. Cruz, dissenting opinion).

75. *In Re: J.F. Boomer*, 12 LAW J. 421 (1947).

76. Roque, *supra* note 48, at 60. *See also In Re: J.F. Boomer*, 12 LAW J. 421 (J. Perfecto, dissenting opinion).

77. *University of the Philippines Board of Regents v. Hon. Elsie Ligot-Telan*, 227 SCRA 342 (1993).

78. *Id.* at 359. The case dealt with the dishonest representation of a student applying for the Socialized Tuition Fee and Acceptance Program of the University of the Philippines, where the Court found reason to discuss the paramount responsibility of law professionals. Justice Florida Ruth P. Romero further cited, thus:

Having reached his senior year, respondent is presumably aware that the bedrock axiom, Canon I, Rule 1.01 of the Code of Professional Responsibility states: A lawyer shall not engage in unlawful, *dishonest*, immoral or deceitful conduct. Further on, Canon 7, Rule 7.01 provides: A lawyer shall be answerable for knowingly making a false statement or *suppressing a material fact* in connection with his application for admission to the bar.

In spite of the protectionist measures established for the legal profession, common practice has allowed foreign entities to get busy at work in the areas of law and accounting.⁷⁹ Through the GATS, firms like *Baker & McKenzie*, *PriceWaterhouseCoopers*, and *Ernst & Young*, have all tied up with local firms *Quisumbing Torres and Associates*, *Isla Lipana & Co.* (formerly *Joaquin Cunanan and Co.*), and *Sycip Gorres Velayo & Co.*, respectively.⁸⁰ This arrangement is built in consonance with Article 1 (2) (c) of the trade in services of the GATS⁸¹ where there is “supply by a service supplier of one Member through commercial presence in the territory of any other member, a situation which contemplates foreign law firms forming a local juridical entity in the territory of another state, referred to as ‘commercial presence.’”⁸²

Also, local firms have been participating in cross-border legal services “by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.”⁸³ In the field of Build-Operate-Transfer power contracts, where the Philippines is particularly skillful, the law firm of *Sycip Salazar Hernandez & Gatmaitan* had “developed a niche practice representing a Japanese trading firm engaged in the development and construction of power plants in South Asian countries.”⁸⁴

79. Roque, *supra* note 48, at 60.

80. John Clements Consultants Inc., In This BPO Corner: The ABCs of Outsourcing, available at http://www.johnclements.com/articles/article_BPO_CornerABCs.htm (last accessed Nov. 15, 2011).

81. GATS, *supra* note 46, art. 1 (2) (c). Professor Roque describes four modes of trade in services, which also corresponds to the Methods of Cross-Border Practice discussed above. The Article states that:

For the purposes of this Agreement, trade in services is defined as the supply of a service:

- (a) from the territory of one Member into the territory of any other Member;
- (b) in the territory of one Member to the service consumer of any other Member;
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

Id. art. 1 (2).

82. Roque, *supra* note 48, at 58.

83. GATS, *supra* note 46, art. 1 (2) (d).

84. Roque, *supra* note 48, at 61. Professor Roque likewise states in his footnote that “Atty. Jaime Renato Gatmaytan, a Partner involved in these power projects,

In the area of Arbitration before the International Center for Settlement of Investment Disputes, the pending case of *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*,⁸⁵ on the matter of the construction of an airport terminal, the respondent Office of the Solicitor General of the Philippines is represented by *White & Case LLP* of Washington DC. In *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*,⁸⁶ James Crawford, an Australian, was nominated for arbitration on the side of the Philippines against Antonio Crivellaro, an Italian.⁸⁷

V. REALITIES BEHIND GLOBAL LAW PRACTICE

If for the time being, structures have traditionally been local while legal practice has been transnational, the problem of regulation will have to arise at one point or another.

A. On Ethics

Matters on how the profession will govern itself and ensure compliance with professional ethics in transnational matters have been widely discussed.⁸⁸ In the European Community, the Trans-European Code of Conduct for Lawyers articulates “both common rules and what can only be described as choice of ethics rules, based on geographic factors, to deal with differences across the European Professions.”⁸⁹ Ethics, commonly being a function of geography, can be viewed differently in that:

The idea that professional ethics is a function of geography is an interesting proposition, one which has clearly been influenced by nineteenth century ideas of conflicts of laws. Recently, however, a distinction has been made between rules of ethics which would be universal in character and rules of professional conduct which could differ from jurisdiction to jurisdiction.

confirmed this fact in an interview with this writer on Mar. 27[,] 2003.” *Id.* See also Practice Areas, Construction and Infrastructure, available at <http://www.syciplaw.com/SubPractices.asp?practiceAreaId=1&subPracticeAreaId=5> (last accessed Nov. 15, 2011).

85. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (U.S./Ger. v. Phil.), ICSID ARB/11/12 (pending). The case was registered before the ICSID on Apr. 27, 2011. See International Centre for Settlement of Investment Disputes, Case Details, available at <http://icsid.worldbank.org/ICSID/FrontServlet> (last accessed Nov. 15, 2011) [hereinafter Case Details].

86. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID ARB/02/6 (Apr. 11, 2008). See Case Details, *supra* note 85.

87. Case Details, *supra* note 85.

88. Glenn, *supra* note 1, at 982.

89. *Id.*

This distinction allows for the emergence of transnational norms and means of control.⁹⁰

Justice Tinga, in his Address, also mentions the potential problem area in applying the appropriate code of conduct relevant to a lawyer engaged in cross-border practice.⁹¹ He notes that “since most nations have adopted their own legal codes of conduct, the question arises whether such codes bind the foreign lawyer practicing in that country, or whether the foreign lawyer remains bound to her or his own national code.”⁹² Still, he holds that “as cross-border practice becomes more prevalent worldwide, the need will arise for the adoption of international agreements governing the code of conduct of lawyers in cross-border practice.”⁹³

B. On Regulation

Another question behind global law practice is the question on regulations for multinational firms that are capable of practicing in various jurisdictions. What started as the growth and development of large law firms led to “an erosion of ethical standards to the detriment of the client.”⁹⁴ The safeguards that belong to a regulated profession have been turned into complex laws.⁹⁵ The presence of large elite firms with clientele from different areas of the globe is likely to affect the domestic market for legal services.⁹⁶ Professional statelessness may result as a condition in which lawyers become disassociated from the legal profession’s values, such as lawyer independence.⁹⁷ The effects of a global lawyer are said to be that:

Lawyering for a global organization runs the risk of creating a new legal elite whose commitment to this understanding [that the lawyer will help the legal system remain the centrepiece of our fragile sense of community, help it to function within our culture as the crucial mechanism for social cohesion and stability] is at best tenuous, and, at worst, nonexistent.⁹⁸

There are still matters that should not waver in the course of globalization. The American Bar Association identifies four core principles that should encompass a universal agreement, to wit:

90. *Id.* at 983.

91. From General Practice to Cross-Border Practice, *supra* note 45.

92. *Id.*

93. *Id.*

94. Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 VAND. J. TRANSNAT’L L. 931, 937 (2001).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

- (1) The practice of law is a learned profession;⁹⁹
- (2) A lawyer must be independent;¹⁰⁰
- (3) Lawyers must be regulated to ensure competence and ethical conduct;¹⁰¹ and
- (4) A lawyer has an obligation to the public in respecting the rule of law in addition to obligations to a particular client.¹⁰²

The practice of law as a learned profession requires specialized training in order that the lawyer gains an understanding of the “shared values of the profession.”¹⁰³ Independence is required so that strict confidentiality is maintained between the lawyer and his client, by which conflicts of interest may be avoided.¹⁰⁴ The practice of law must be governed by regulations so that the concept that a lawyer is to serve the public interests is also recognized.¹⁰⁵ The legal profession operates within the rule of law and therefore comprises a “transparent system of justice, strengthens the disparate institutions of the world’s governments, and reinforces the fabric of society.”¹⁰⁶

C. On Practice

The legal profession gains its strength through its independence. It is said that at the heart of the lawyer, who is practicing in both national and international levels, lies the need for liberty and freedom.¹⁰⁷ But one begins to ask how this “vision of the independent lawyer”¹⁰⁸ is reconciled with the realities behind global law practice.¹⁰⁹ What is the extent of this independence and how does this figure into the rule of law?

1. Regulatory Powers of the State

99. *Id.* at 938 (citing Philip S. Anderson, President of the American Bar Association, Remarks at the Transnational Practice for the Legal Profession Forum (Nov. 9–10, 1998), in 18 DICK. J. INT’L L. 43, 44 (1999)).

100. Whelan, *supra* note 94, at 938.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Whelan, *supra* note 94, at 938.

107. *Id.* at 941.

108. *Id.*

109. *Id.*

Through globalization, the powers of global law firm clients have increased. As a result, the powers of nation states in regulating transactions have been put to the test due to a variety of sources.¹¹⁰ States are being challenged by transnational law firms:

from neoconservative ideologues, despairing social democrats[,] and deluded populists; from powerful corporations which have created transnational markets and world-wide manufacturing and sourcing strategies; from communications and transportation technologies which can move ideas, goods, money[,] and people across national boundaries with relative ease and great speed.¹¹¹

Clients of global law firms are those with much influence and power in their local State. These same clients also make a dent in the international economy particularly in investment and commercial banks, multinational corporations, and insurance companies.¹¹² The common trait of these firms would be their capacity to by-pass or resist states, allowing them to essentially “divorce markets from nation-states.”¹¹³ Clients are able to exceed the dominance of the state. This is no surprise since some of the largest multinational corporations have a capital value that exceeds the gross domestic product of other nations.¹¹⁴

Wal-Mart, a company engaged in general merchandising, took the number one spot on this year’s Fortune 500 list, which is an annual ranking of America’s largest companies.¹¹⁵ Despite sales in U.S. stores dropping in seven straight quarters, it was able to make \$421 million in revenues.¹¹⁶ The second among the ranks is Exxon Mobil, a company engaged in Petroleum Refining.¹¹⁷ For the same year, it made \$354 million in revenues.¹¹⁸ Many firms belonging to the Fortune 500 are staple brands in the Philippines.

110. *Id.*

111. *Id.*

112. Whelan, *supra* note, at 942.

113. *Id.* at 942 (citing Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1058, 1111 (1999)).

114. Whelan, *supra* note 94, at 942.

115. CNN Money, Fortune 500: Wal-Mart Stores, available at <http://money.cnn.com/magazines/fortune/fortune500/2011/snapshots/2255.html> (last accessed Nov. 15, 2011).

116. *Id.* Figures are for fiscal year ended Jan. 31, 2011. *Id.*

117. CNN Money, Fortune 500: Exxon Mobil, available at <http://money.cnn.com/magazines/fortune/fortune500/2011/snapshots/387.html> (last accessed Nov. 15, 2011).

118. *Id.*

General Electric,¹¹⁹ General Motors,¹²⁰ Ford Motor,¹²¹ Hewlett-Packard,¹²² and Citigroup,¹²³ firms belonging to the top 15, are household names in the country.

These transnational corporations that bring in such a large amount of money into the country are responsible for increases in “foreign investment and cultural concentration.”¹²⁴ In other words, many efforts would be directed towards pleasing these corporations into keeping shop within the country. However, it becomes a serious point of concern as to what extents should be undertaken without compromising the need to regulate transactions. Corporate power changes governments by holding countries ransom over their investment regimes and deregulation of labor markets.¹²⁵

2. Independent Judgment

Freedom from undue influence is critical because while a lawyer’s duty is to his client, the interests of third parties, the courts, and society at large are not

119. General Electric (GE) ranked 6th in Fortune 500. Despite the nuclear disaster in Japan involving GE-design reactors, the firm made \$151 million in revenues. CNN Money, Fortune 500: General Electric, *available at* <http://money.cnn.com/magazines/fortune/fortune500/2011/snapshots/170.html> (last accessed Nov. 15, 2011).

120. General Motors, engaged in the industry of motor vehicles and parts, ranked 8th in Fortune 500 making \$135 million in revenues. CNN Money, Fortune 500: General Motors, *available at* <http://money.cnn.com/magazines/fortune/fortune500/2011/snapshots/175.html> (last accessed Nov. 15, 2011).

121. Ford Motor, engaged in the industry of motor vehicles and parts, ranked 10th in Fortune 500, making \$128 million in revenues. Outside the U.S., the automaker delivered robust sales in India, Russia, and Eastern Europe. CNN Money, Fortune 500: Ford Motor, *available at* <http://money.cnn.com/magazines/fortune/fortune500/2011/snapshots/160.html> (last accessed Nov. 15, 2011).

122. Hewlett-Packard, engaged in the business of computers and office equipment, ranked 11th in Fortune 500. CNN Money, Fortune 500: Hewlett-Packard, *available at* <http://money.cnn.com/magazines/fortune/fortune500/2011/snapshots/206.html> (last accessed Nov. 15, 2011).

123. Citigroup, in the industry of commercial banks, ranked 14th in Fortune 500. CNN Money, Fortune 500: Citigroup, *available at* <http://money.cnn.com/magazines/fortune/fortune500/2011/snapshots/2927.html> (last accessed Nov. 15, 2011).

124. Whelan, *supra* note 94, at 942.

125. *Id.* (citing War on Want, *The Global Divide: Globalisation, Work and World Poverty*, in INTERNATIONAL TRADE UNION RIGHTS FOR THE NEW MILLENNIUM 15 (2000)).

obscurities that he may ignore.¹²⁶ On the opposite side of the coin lies complete influence, mostly of the interests of the client, which is called the “privatization of the lawyer’s role.”¹²⁷ This, according to the libertarian ideology, creates a bias for the client:

The American legal profession’s endorsement of the lawyer’s duty of zealous advocacy — as opposed to her duty to serve as an ‘officer of the court’ — encourages a more entrepreneurial form of legal practice ... Although this ideology operates to a lesser extent within England, it is this ideology that is being exported by both U.S. and U.K. global law firms.

Global law firms operate in highly competitive markets ... It is not surprising that firms which serve corporations and banks have a strong commercial-entrepreneurial ethos. In such markets, duties to the system, to the court, and to third parties inevitably become marginali[z]ed. The very notion of lawyer independence thus ‘rings somewhat hollow in today’s practice environment in which law firm partners focus closely on bottom line profitability, implement corporate-like organizational structures, and reward rainmaking more than legal skills.’¹²⁸

U.S. lawyers have been described as *chameleons* who emulate their client instead of being wise, detached, and independent professionals, such as *owls*.¹²⁹ In other words, due to cut-throat competition, loyalty to the client becomes of utmost importance, lest they gamble on the firm’s stability. Professional suicide could be committed by exercising independent professional judgment in disagreement to the client’s interests.¹³⁰

3. Rule of Law

The Rule of Law refers to a system that upholds the four universal principles, namely:

- (1) The government and its officials and agents are accountable under the law.¹³¹

126. Whelan, *supra* note 94, at 943.

127. *Id.* (citing Robert W. Gordon, *A Collective Failure of Nerve: The Bar’s Response to Kaye Scholer*, 23 LAW & SOC. INQUIRY 315, 320 (1998)).

128. Whelan, *supra* note 94, at 944.

129. *Id.*

130. *Id.* at 945.

131. Mark David Agrast, et al, World Justice Project Rule of Law Index 2011 (A World Justice Project Advancing the Rule of Law Around the World) 1, available at http://worldjusticeproject.org/sites/default/files/wjproli2011_0.pdf (last accessed Nov. 15, 2011).

- (2) The laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property.¹³²
- (3) The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.¹³³
- (4) Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.¹³⁴

The Rule of Law may be used in legal practice as when corporate lawyers use the law to “undermine the state via private lawmaking.”¹³⁵ Here, lawyers are cunning to create law “from the ground up” by pushing its limits and exploiting its loopholes.¹³⁶ Lawyers through “creative compliance” defeat the purpose of the law by arguing based on the letter of the law but at the same time defying its spirit.¹³⁷

Disregard for the Rule of Law is an extreme for the transnational lawyer. This should not be the case:

[i]f globalization overrides the rule of law, global lawyers are implicated in actions that are contrary to the public interest and to the core values of the legal profession. As one practitioner put[s] it, while lawyers are advising their clients to obey the law, they are often finding ways to wink at or avoid complying with local practice rules which may be unreasonable arbitrary. The rhetoric of the core values adds value to the client, but at the expense of the public interest.¹³⁸

While the transnational lawyer is capturing a broader stage through his intellectual prowess, the very spirit of the law is required to stand aside at the expense of the audience that is the client.

VI. CONCLUSION

Anent the movement of the globalization of services, from which the legal profession is not apart, regulatory systems must definitely be made applicable to the transnational lawyer. There are various bases for the Philippine system

¹³². *Id.*

¹³³. *Id.*

¹³⁴. *Id.*

¹³⁵. Whelan, *supra* note 94, at 946.

¹³⁶. *Id.*

¹³⁷. *Id.*

¹³⁸. *Id.* at 948.

to cling on to more traditional views, keeping the closed mentality dictated in the cases of *In Re: J.F. Boomer* and *UP Board of Regents*. However, this may be an outdated impression of the times. All around, many are flocking in and out of countries due to the accessibility of communication, trade, and travel. Expecting that professional services would remain an exception up to this day would be closing one's eyes to the opportunities brought about by the so-called *borderless state*.

The intricacies of the law have made cross-border practice in the Philippines unclear. Since many firms have in fact already been "practicing law," as the term suggests under jurisprudence, concretizing policies that refer to cross-border practice must begin.